IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

PABST BREWING COMPANY, Appellant.

vs.

G. Y. CRENSHAW AND JOHN J. DOWNEY, Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF OF APPELLEES.

STATEMENT OF CASE.

The Pabst Brewing Company, a corporation of the State of Wisconsin, instituted this suit in the Circuit Court of the United States for the Western District of Missouri to obtain an injunction, restraining the Beer Inspector of the State of

Missouri and his deputy from enforcing against it the provisions of an act of the General Assembly of said State, known as the "Beer Inspection Law," and prohibiting them from inspecting or attempting to inspect the beer and other malt liquors manufactured or offered for sale by the complainant and others similarly situated, and from collecting or attempting to collect, under said act, any tax or inspection fee from it or others in like situation.

The bill alleges numerous grounds for the relief sought, and charges that many of the provisions of the Statute in question are in conflict with the Federal Constitution.

All of these objections have been abandoned save one, which alone is insisted upon in this Court.

The sole complaint here of the appellant is that the Missouri Statute, in so far as it applies to beer manufactured in other States and shipped into Missouri for sale and consumption there, is an unauthorized interference with interstate commerce and violative of section 8 of article 1 of the Constitution of the United States, because said act provides that, *after such beer is received in Missouri,* and before its sale in said State, the inspector shall be furnished with an affidavit from the manufacturer or other reputable person having knowledge of the facts, stating that no materials other than pure hops or extract of hops, or pure barley, malt or wholesome yeast, or rice was used in the manufacture of the same, and further requires the payment to the inspector of one-half a cent for each gallon of such beer and one cent for labeling each package of eight gallons, which amount is to be paid into the State Treasury and is largely in excess of the salary and expenses of the inspectors. It is therefore claimed that this is a specific tax upon the beer for revenue purposes, the imposition of which upon beer shipped from other States into Missouri for sale there, is an interference with interstate commerce

and violative of the section of the Federal Constitution above referred to.

It is not claimed that the Statute makes any discrimination between foreign and domestic brewers in the amount to be collected by the inspectors, or in the ingredients to be used in the manufacture of beer. Both are placed upon an equality and neither is given any advantage over the other.

Defendants demurred to the bill. The Judge of the trial Court delivered a written opinion upon this demurrer, which is set out in full in the record. It was held that the act did not violate the Constitution of the United States but was a valid exercise of the police power by the State. The bill charged, however, that defendants insisted upon the payment of fees upon beer, which was only temporarily in the State of Missouri, and was intended to be forwarded for sale in other States and was in fact only being shipped through said State to its final destination. The Court held that the act did not authorize a demand of this character, and as the demurrer went to the whole bill, it was overruled. Subsequently an agreed statement of facts was filed, in which it was conceded that defendants only demanded fees upon beer after it had reached its destination and which had been shipped by complainant into Missouri for sale and consumption in said State; and, following the reasoning in the written opinion, the Court dismissed the bill and the complainant has brought the case here by appeal.

The section of the Statute applicable to the appellant is as follows:

"Section 5. Every person, persons or corporation, who shall receive for sale or offer for sale any beer or other malt liquors other than those manufactured in this State, shall upon receipt of same, and before offering for sale, notify the inspector, who shall be furnished with a sworn affidavit, subscribed by an officer authorized to administer oaths, from the manufacturer there-

of, or other reputable person having actual knowledge of the composition of said beer or other malt liquors, that no material other than pure hops, or extract of hops, or pure barley, malt or wholesome yeast or rice, was used in the manufacture of same; upon receipt of said affidavit the inspector shall inspect and label the packages containing said beer or malt liquors, for which services he shall receive like fees as those imposed upon the manufacturers of beer and malt liquors in this State."

It will be noted that the Statute makes no attempt to interfere with the shipment of beer into the State of Missouri, or to regulate the manner of its shipment, or to affect it in any way during its transportation. The act, by its express terms, is only applicable after the beer has been received within the State for sale there.

Other sections of the Statute, as construed by the Supreme Court of Missouri, require the domestic brewer to submit his product to inspection at his brewery and to pay at said place before sale the inspection fees exacted by the State for the privilege of selling the same therein. In order to put the foreign manufacturer upon the same footing, he is required, after his beer or other malt liquors have been received in said State for sale, to present to the inspector an affidavit showing the materials from which it was manufactured and to pay precisely the same fees to the State as the domestic brewer.

A copy of the act as amended by the Legislature in 1901 is printed with this brief for the convenience of the Court.

It will be seen, therefore, as above stated, that the only question for consideration is, whether the State is prohibited from the enactment of this legislation by the interstate commerce clause of the Federal Constitution.

BRIEF.

I.

THE SUPREME COURT OF THE STATE OF MISSOURI HAS HELD THE LAW TO BE CONSTITUTIONAL, AND IT IS NOT OPEN TO APPELLANT TO QUESTION ITS VALIDITY UPON THE GROUND OF ANY SUPPOSED CONFLICT WITH THE STATE CONSTITUTION.

State vs. Bixman, 162 Mo., 1.

THIS COURT WILL FOLLOW THE HIGHEST COURT OF THE STATE IN QUESTIONS INVOLVING THE CONSTRUCTION OF THE STATE CONSTITUTION.

II.

THE ONLY QUESTION FOR DETERMINATION HERE IS WHETHER THE ACT VIOLATES THE CONSTITUTION OF THE UNITED STATES; AND IN DETERMINING THAT QUESTION, THE FEDERAL COURTS WILL ADOPT THE CONSTRUCTION GIVEN TO THE STATUTE BY THE SUPREME COURT OF THE STATE.

Cargill vs. Minnesota, 180 U. S., 452.

III.

THE "WILSON BILL" PUTS INTOXICATING LIQUORS SHIPPED INTO A STATE WITHIN THE POLICE POWER OF SUCH STATE IMMEDIATELY UPON THEIR ARRIVAL. SUCH LIQUORS DO NOT STAND UPON THE SAME FOOTING AS OTHER ARTICLES OF INTERSTATE COM-

MERCE, AND AUTHORITIES TOUCHING THE LATTER ARE INAPPLICABLE, SINCE THE PASSAGE OF SAID BILL, TO THE FORMER. THE STATE MAY PRESCRIBE THE TERMS AND CONDITIONS UPON WHICH SUCH LIQUORS MAY BE SOLD, EVEN IN THE ORIGINAL PACKAGES, AND, IN THE ABSENCE OF DISCRIMINATION AGAINST THE PRODUCTS OF OTHER STATES, SUCH REGULATIONS ARE VALID.

Vance vs. Vandercook Co., 170 U. S., 438.

Reyman Brewing Company vs. Brister, 179 U. S., 445.

This Court said in Vance vs. Vandercook Co., *supra*:

"It is also certain that the settled doctrine is that the power to ship merchandise from one State into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any State regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until by a sale in the original packages they have become commingled with the general mass of property in the State.

This last proposition, however, whilst generally true, is no longer applicable to intoxicating liquors, since Congress, in the exercise of its lawful authority, has recognized the power of the several States to control the incidental right of sale in the original packages, of intoxicating liquors shipped into one State from another, so as to enable the States to prevent the exercise by the receiver of the accessory right of selling in the original packages, *except in conformity to lawful State regulations.* * * * *

The claim that the State Statute is unconstitutional because it deprives of the right to sell imported liquor in the original packages rests therefore on the assumption that the State law is a regulation of interstate commerce, because it forbids the doing of an act which, in consequence of the permissive grant resulting from the act of Congress, the State had undoubtedly the lawful power to do. Indeed, the entire argument by which it is endeavored to maintain the contention arises from excluding from view the change as to the sale of intoxicating liquors arising

from the act of Congress; that is, it rests on the fallacious assumption that the State is without power to forbid the sale of intoxicating liquors in original packages despite the act of Congress, while in fact, as a result of that act, the restrictions and regulations of State laws become operative on the original package before the sale thereof, and *therefore such packages cannot be sold if the State law forbids the sale or can be only so sold in the manner and form prescribed by the State regulations.* In view of the self-evident misconception upon which the argument proceeds, it becomes unnecessary to review the many decisions of this Court cited in support of the proposition relied upon." * * *

"Congress, it is argued, by the act in question, has submitted merchandise in original packages only to the control of State laws, 'enacted in the exercise of its police powers.' As the State law here in question does not forbid, but, on the contrary, authorizes the sale of intoxicants within the State, hence it is not a police law, therefore not enacted in the exercise of the police power of the State, and consequently does not operate upon the sale of original packages within the State. But the premise upon which these arguments rest is purely arbitrary and imaginary. *From the fact that the State law permits the sale of liquor subject to particular restrictions and only upon enumerated conditions, it does not follow that the law is not a manifestation of the police power of the State.* The plain purpose of the act of Congress having been to allow State regulations to operate upon the sale of original packages of intoxicants coming from other States, it would destroy its obvious meaning to construe it as permitting the State laws to attach to and control the sale only in case the States absolutely forbade sales of liquor, and not to apply in case the States determined *to restrict or regulate the same."*

It is further said:

"But this restricts the police power to the mere right to forbid, and denies any and all authority to regulate or restrict. *The manifest purpose of the act of Congress was to subject original packages to the regulations and restraints imposed by the State law.* If the purpose of the act had been to allow the State law to govern the sale of the original packages only where the sales of all liquor were forbidden, this object would have found ready expression, *whilst on the contrary, the entire context of*

the act manifests the purpose of Congress to give to the respective States full legislative authority, both for the purpose of prohibition as well as for that of regulation and restriction with reference to the sale in original packages of intoxicating liquors brought in from other States, nor is the claim well founded that it was decided in Scott vs. Donald that the provisions of the act of Congress of 1890 do not apply in any State by whose laws the sale of liquor is not absolutely forbidden."

"Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. *Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid.* But the State cannot, under the congressional legislation referred to, establish a system, which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

IV.

THE ACT OF THE GENERAL ASSEMBLY OF MISSOURI IS A POLICE MEASURE AND A VALID EXERCISE OF THE POLICE POWER OF THE STATE. IT COMES WITHIN THE EXPRESS TERMS OF THE "WILSON BILL."

a. The argument against the statute is that it provides no means for inspecting foreign beer shipped into the State and furnishes no test by which its purity can be determined, and, as the amount exacted by the State before permission is given to sell such beer in said State greatly exceeds the salaries of the inspectors and other costs of collection, it simply amounts to a specific tax upon the property and cannot be referred to the police power. Hence it is said the "Wilson Bill" does not apply.

The statute names the materials from which beer must be manufactured. It prohibits the use of any other. As construed by the Supreme Court of the State, it provides a method for the inspection of the home product at the brewery. An officer of Missouri cannot be stationed at the place of manufacture in other States to examine the ingredients used and pass upon the quality

of the beer as it is being made. Hence it is that the statute requires an affidavit from the manufacturer or other person having knowledge of the facts, showing the materials used in making foreign beer. No other course is open to the State to determine its purity. It must rely upon evidence furnished its officers after the beer comes within its jurisdiction. The character of the act as an inspection measure cannot be destroyed because the bill may not be perfect or the best means may not have been adopted. It is enough that it provides means to test the quality of the beer shipped into the State.

The real objection, however, is that the amount exacted by the State exceeds the inspectors' salaries and the cost of collection and furnishes a large amount of general revenue and must therefore be treated as an exercise of the taxing power.

It by no means follows that, because a large revenue is derived from a statute regulating the traffic in intoxicating liquors, such statute cannot be deemed a police measure.

"It is within the power of the Legislature to tax the liquor traffic, wholesale, as well as retail, and an act providing for the taxing of such business is not a bill to raise revenue, but simply an exercise of the police power of the State."

11 Am. and Eng. Enc. of Law (1st Ed.), 592.

Black on Intoxicating Liquors, Sec. 55.

Kurth vs. State, 86 Tenn., 134.

"Licenses for the sale of intoxicating liquors are not only imposed for the purpose of raising revenue, but also for the purpose of regulating the traffic and consumption of these articles, and hence the State may impose such conditions for conducting said traffic as it may deem most for the public good. Instead of a license fee of $125 it might have imposed a license fee of $250 *or any other amount.*"

McGahey vs. State of Virginia, 135 U. S., 662.

The Supreme Court of Missouri responded to a similar objection made to this act in State vs. Bixman, 162 Mo. Loc. Cit., 19, in these words:

"By any easy transition we are now brought to the vital proposition in this case. It is propounded in the query of one of the learned counsel for the defendant: 'Is the act simply an inspection measure? Is it a revenue measure? Is it both an inspection and a revenue measure?' Our conclusion depends largely upon the proper answer to this question. If we can clear away all confusion on this point the other propositions, which are dependent upon it, will be of comparatively easy solution. The insistence of the learned counsel for the defendant is that it is an act to levy a general revenue or property tax and not a police regulation. In arriving at this conclusion great stress is laid upon the fact that a large revenue—an amount approximating a half million dollars—is covered into the State Treasury, together with the fact that the statute requires all the fees arising under it to be paid directly into the Treasury, and that the salaries of the inspector and his deputies shall be paid out of a distinct appropriation for that purpose. Having satisfied themselves that it is simply a revenue tax, and the law a method of raising revenue only, counsel proceed to occupy two more advanced positions, to-wit, that if the Legislature intended by these inspection fees to raise revenue, the law cannot stand, and that the Legislature has not an arbitrary power to prohibit the sale of beer. Both of these propositions we answer in the negative, upon long-established principles.

As to the first, this Court has answered in no uncertain language. In State vs. Hudson, 78 Mo., 305, the Court said:

'It does not follow because the license fee is large, or because it may become a part of the public revenue, that it is therefore a tax. Many fines, penalties, and forfeitures become a part of the public revenue of the State that are not derived from taxation. The disposition of the fund derived from the license fees does not necessarily determine the character of such fees.' We may add that when the subject is within the police power, as we think we shall be able to show, this is then the extent to which it shall be exercised, and the regulations to effect the desired end, are matters within the legislative discretion. The fact

that a large revenue results from this price which the Legislature requires of the brewers for the privilege of carrying on their business in this State, does not establish that it is a simple revenue tax under the guise of inspection merely."

The Court then concludes upon this branch of the case as follows:

"Having thus indicated the fundamental principles which must control in our construction of the act of May 4th, 1899, we are prepared to answer the question propounded as to the nature of the exaction prescribed by the statute. In our opinion, it is a police regulation, imposing conditions upon the business of manufacturing and selling beer and malt liquors in this State, which business the State may absolutely suppress or permit upon such terms as the Legislature may prescribe. We construe the act in view if all its parts and in connection with other license laws in this State and hold that the fee exacted is the price which the State demands for the privilege of doing the business of brewing and selling beer and malt liquors in this State, and it is immaterial by what name it is called, and being such it is not a tax upon property within the meaning of our Constitution, and hence the objection that it is not levied according to value, and is not uniform, and exceeds the constitutional rate, must fall with the proposition to which they are corollaries."

It was urged upon the trial Court in this case that the act under consideration cannot be treated as a police measure because of the large revenue to the State therefrom. The learned Judge of the Court below answered this contention in his opinion upon the demurrer (120 Fed., Loc. Cit., 152), in these words:

"Laws for protecting the people against impure food, adulterated milk and butter, decayed vegetables, and unwholesome ingredients in intoxicating liquors, inhere in the police power of the State. The fact that a large revenue may incidentally result is not fatal to such a law, especially in respect to intoxicants. In the very nature of the case, the amount of the license fee must rest in the sound discretion of the legislative branch of the government. As said by Mr. Justice Catron, in the licenses cases, 5 How. 504-599:

'The assumption is, that the police power is not touched by

the Constitution, but left to the States, as the Constitution found it. And this is conceded; and whenever a thing, from character and condition, is of a description to be regulated by that power of the State, then the regulation may be made by the State, and Congress cannot interfere.'

Subject, of course, to the ascertainment by the Federal Courts, in a proper case, as to whether or not the thing be within the essential police power of the State.

This character of legislation is bottomed upon the postulate in this country, that the right to sell intoxicants is not a natural right. Hence, it is universally recognized that the State may prohibit entirely its sale within its territory, or it may grant permission to sell under such restrictions and regulations as the law making department in its wisdom may see fit to impose. And so long, under the statute, as the regulation and exaction are free from unequal discrimination against products the subject of interstate commerce, this complainant is without legal grievance.

The large yield to result to the State from the inspection fees exacted beyond the cost of executing the law, is supported by that eminent jurist, Judge Cooley, who said:

'It is proper and reasonable to take into account not only the expense merely of direct regulation, but all the incidental consequences which may be likely to subject the public to cost in consequence of the business licensed. In some cases the incidental consequences are much the most important, and, indeed, are what are principally had in view when the fee is decided upon. * * * The business of selling intoxicating liquors has a powerful tendency to increase crime and pauperism. It renders a large force of peace officers essential and it adds to the expense of the Courts, and of nearly all branches of civil administration. It cannot be questioned, therefore, if it is to be licensed by the public authorities, that it is legitimate and proper to take into account all the probable consequences, or that the payment to be exacted should be sufficient to cover all the incidental expenses to which the public are likely to be put by means of the business being carried on. Cooley on Taxation, Sec. ed. 599. State vs. Luddington, 33 Wis., 107.

It is upon this theory that high license laws of the State are upheld.

'Such laws are regarded as police regulations, established by the Legislature for the prevention of intemperance, pauperism

and crime, and for the abatement if nuisances, and are not regarded as an exercise of the taxing power. Pursuits that are pernicious and detrimental to public morals may be prohibited altogether, or licensed for a compensation to the public. It does not follow because the license fee is large or because it may become a part of the public revenue, that it is, therefore, a tax.' State ex rel. vs. Hudson, 78 Mo., 302, l. c., 304-305."

b. It is argued, however, that these cases only discuss the rules applicable to *license* fees and the amount that may be charged for *licenses* to sell intoxicants It is said that the act under discussion is not a *license* measure and was not intended to restrict or in any degree regulate the sale of beer, and has nothing to do with the general statutes of the State requring license fees from those engaged in such business.

It may be answered that the fee required by the statute is not a tax upon the beer because the owner may bring it into the State, consume it himself, or give it away without the payment of any fee under this act. He may keep it in the State indefinitely and no payment will be exacted from him. It is not an annually recurring charge as in the case of taxes upon property. It is paid once for all. He can keep the beer without the payment of the fees, but he is not permitted to sell until the same are paid. As soon as the payment of the fees required by the statute is made, he then has the privilege of selling. Without the payment he is not allowed to sell, and with it that privilege is conferred. Wherein does this differ from any other exaction or fee demanded by the State as a condition precedent to the grant of a license or privilege to sell intoxicants—which the State may withhold at its pleasure?

The State demands an affidavit showing the materials from which the beer was manufactured and the payment of the fees fixed by the act for the privilege of selling such beer in said State. It is a privilege which the State may withhold. It may affix to

the grant such conditions as the Legislature deems proper, provided no unfair discriminations are made. The home brewer pays for this privilege at his brewery in proportion to his output, and a like exaction is made from persons or corporations who bring into the State for sale beer made in other States.

It is incorrect to say that the right to sell beer is derived from other statutes. The provisions of the act under review attach to and become a part of the license laws of the State, regulating the right to manufacture and sell beer. It will not do to say, therefore, that this is not a tax upon the privilege or business on the ground that the right to engage in the business is given by another statute. It was still within the power of the Legislature to impose additional conditions and burdens upon the privilege of carrying on the business. It is not necessary that all the regulations of the liquor traffic should be contained in one statute.

State vs. Luddington, 33 Wis., 107.

Kurth vs. State, 86 Tenn., 134.

Complainant, after the passage of this act, was not authorized to sell beer by virtue of a license granted to it under other statutes, *unless it also complied with the requirements of this law.* The construction of the State statutes by the highest Court of Missouri will be adopted by this Court. Hence we quote again from the State vs. Bixman, *supra*, upon this subject:

"Learned Counsel strenuously urged that this cannot be a tax or burden placed upon the business, in contradistinction to a tax upon property, as we have hereinbefore decided, because, they say, an occupation tax involves two elements—payment of a fixed amount for a fixed time and a permit to carry it on for a fixed time. This assumes that in some way the Legislature is restricted to this exact method. But we hold that it is competent for the Legislature to fix the amount in proportion to the business

done or the output sold as in this case. This is a matter for the law-making power to determine, and, as we have already said, it does not follow that a license must issue for a fixed period. The imposition of the tax is one thing; the license another. Certainly, a statute providing for licensing the manufacture and sale of beer, and containing the inspection features of the act before us, and requiring the payment of the fees prescribed therein as a condition precedent for carrying on the business under such license, would be a valid exercise of police power, *and such is the effect of this law when considered with the other statute in pari materia.*"

c. The State has plenary police power to regulate the manufacture and sale of intoxicating liquors within its borders. It may entirely prohibit the same or permit it upon such terms as the Legislature imposes. It may require the inspection of beer and other malt liquors or may demand other evidence of their purity and may fix the charges that must be paid before such liquors can be sold in said State. Having the right to absolutely *prohibit*, it may authorize the manufacture and sale upon condition that the charges, which it makes for its official inspection, shall be paid into the State Treasury. As it may prohibit entirely, the Legislature may license conditionally. It may effect the licensee with such restraints, conditions and responsibilities as it chooses to require. The right to manufacture and sell intoxicating liquors is not a natural right.

"The Legislature may grant or withhold authority to sell at its pleasure, and granting such authority, it is held by the licensee at the mere pleasure or grace of the body granting it. It is held by him not as a matter of privilege and absolute right, but as a favor, which, like all favors must be received upon such terms and conditions and subject to such burdens and inconveniences as the donor thinks proper to impose, and the donee elects to accept."

State vs. Luddington, 33 Wis., 107.

Black on Intoxicating Liquors, Sec. 39.

Austin vs. State, 10 Mo., 591.

State vs. Bixman, 162 Mo., 1.

In McGahey vs. State of Virginia, 135 U. S., 662, it was urged that a dram shop keeper was entitled to pay his license fee in "tax coupons," notwithstanding the statute of the State required the payment in lawful money of the United States. This Court said that it was conceded that the State might in her discretion absolutely abolish the sale of intoxicating liquors, or prescribe upon what terms they should be sold. "In this view, there does not seem to be any violation of the obligation of the State in requiring the tax which is imposed to be paid in any manner whatever—in gold, in silver, in bank notes, or in diamonds. The manner of payment is part of the condition of the license intended as a regulation of the traffic. It would be very different if the business sought to be followed was one of the ordinary pursuits of life in which all persons are entitled to engage."

Also

Boston Beer Co. vs. Mass., 97 U. S., 25.

City of Danville vs. Hatcher (Va.), 44 S. E., 723.

In the case last cited it is said:

"It has been repeatedly decided that the subject is wholly within the police power of the Legislature and that the traffic is not one of the privileges or immunities of citizenship guaranteed and protected by the United States Constitution or the fourteenth amendment thereto. It may be entirely prohibited; and its regulation, when permitted, is absolutely within the discretion of the several States."

The Court of Appeals of Maryland said of the Legislature of that State:

"They may prohibit the sale of spirituous liquors if they see fit to do so; or *they may restrict it in any manner which their*

discretion may dictate. No one can claim as a right the power to sell, either at any time, or at any place, or in any quantity. If he is allowed to sell under any circumstances it is by the free permission of the Legislature *and on such terms as it sees fit to impose."*

Tragesser vs. Gray, 9 L. R. A., 780.

And the Supreme Court of Alabama in Ex Parte Sikes, 24 L. A. R., 774, declared that:

"Having the power to prohibit, the Legislature undoubtedly could fix the price of a license to sell liquor at any sum."

A tax is frequently imposed upon a business or other exactions are required from parties engaged in it in order to discourage and restrict it.

"Custom has much to do in determining whether certain classes of exactions are to be regarded as taxes or as duties imposed for regulation. If by the common understanding and general custom of the country, a particular duty is regarded as being imposed upon certain individuals, not as their proportionate share in the burdens of government, but because of some special relation to property peculiarly located, *or to business peculiarly troublesome or dangerous,* so that a requirement that the duty shall be performed by such individuals is usually regarded as only in the nature of regulation of relative obligations and duties through the neighborhood or municipality, there is no sufficient reason why this may not be considered a mere police regulations, *though the proceedings assume the form of taxation and are even designated by that name."*

Cooley on Taxation, 2nd Ed., 587.

The State of Missouri, under its police power, has the right to prohibit the sale of intoxicating liquors entirely or to permit such sale under such regulations and conditions as the Legislature may prescribe. In the exercise of this power, the State has declared that until the home brewer has had his product inspected

at his brewery and has paid the fees fixed by the act under consideration, he shall not sell, but when this is done and the other laws of the State complied with, he may sell the beer manufactured by him. It has further declared that the foreign manufacturer who ships his product for sale into said State shall furnish an affidavit to the proper officer showing the quality thereof and shall pay like fees as the citizens of said State. This is the price exacted by the State for the privilege of doing that which the Legislature might prohibit in toto. The Supreme Court of Missouri said in the case hereinbefore cited:

"We construe the act in view of all its parts, and in connection with other license laws of this State, and hold that the fee exacted is the price which the State demands for the privilege of doing the business of brewing and selling beer and malt liquors in this State, and it is immaterial by what name it is called," etc.

So the act was passed in the exercise of the police power and comes within the provisions of the "Wilson Bill."

V.

IF APPELLANT'S CONTENTION, THAT UNDER THE GUISE OF AN INSPECTION LAW, THE STATE STATUTE SIMPLY IMPOSES A SPECIFIC TAX UPON BEER FOR GENERAL REVENUE PURPOSES, WAS CORRECT, STILL THERE IS NOTHING IN THE INTERSTATE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION TO PREVENT SUCH TAX.

In Hinson vs. Lott, 75 U. S., 148, a direct tax of fifty cents a gallon upon spirituous liquors shipped into Alabama for sale there was upheld by this Court, a like tax being demanded upon domestic liquors. It was decided that there was no violation of the Federal Constitution by the imposition of such a tax. The statute then under consideration enacted:

"Before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquor for sale within the limits of

this State, such dealer or dealers introducing any such liquor into the State shall first pay the tax collector of the county into which such liquors are introduced a tax of fifty cents per gallon upon each and every gallon thereof."

The act of the Legislature of the State of Missouri now before the Court, under this decision, would not be violative of the Federal Constitution, if appellant's construction should be adopted, and it should be held to impose upon beer manufactured in or shipped to said State a specific tax of one-half of cent per gallon.

The Missouri statute does not impose any restriction upon the shipment of beer into the State. No fee or tax or other exaction is made until after it has been received at its destination in said State, and is held there for sale. The interstate commerce clause does not prohibit the levy of a tax upon goods brought from another State after they have arrived at their destination.

"Goods brought into a State from another are not imported within the meaning of the U. S. Constitution, Art. 1, § 10, par. 3, forbidding State taxation of imports, and are, therefore, though still in the original packages, subject to State taxation after they have reached their destination and are held in the State for sale."

American Steel & Wire Co. vs. Speed, 192 U. S., 500.

Carstairs vs. Cochran, 193 U. S., 10.

VI.

THE BILL WAS PROPERLY DISMISSED. IT DOES NOT STATE A CASE AUTHORIZING AN INJUNCTION.

1. It is not charged in the bill that defendants are attempting to take possession of, interfere with, or destroy, without complainant's consent any of its property. Complainant does not need an injunction to prevent the inspection of its beer. No such inspection under the State can be made *without its consent.*

There is certainly no reason for an injunction to prevent that which cannot be done *except at the request of complainant.* Unless an affidavit is furnished by the complainant, and the packages of beer pointed out to the inspectors, they have no duty to perform under the act. The statute itself is pleaded in full in the bill, so the Court will determine what they can do "when they are about to enforce its provisions," as charged in the bill. It is not required even that defendants give information to the proper prosecuting officers upon which to base criminal proceedings. The complainant had just as well "enjoin itself" from submitting the affidavits and pointing out the packages to be inspected by the defendants. The defendant can do nothing towards an inspection unless at complainant's request.

2. An injunction against the *defendants* would not prevent grand juries from returning indictments or prosecuting officers from filing informations under section twelve, which is the method for beginning criminal prosecution provided by the act, and also by the general laws of the State.

3. The defendants are not required to institute such proceedings; but if they were, it has been held that an injunction is not the proper remedy to prevent criminal prosecutions.

"It remains only to consider the case so far as the final decree assumes to enjoin the officers of the State from instituting or prosecuting any indictment or criminal proceeding having for their object the enforcement of the statute of 1895. We are of opinion that the circuit court of the United States, sitting in equtiy, was without jurisdiction to enjoin the institution or prosecution of these criminal proceedings commenced in the State Court."

"Undoubtedly, the courts of the United States have the power, under existing legislation, by writ of habeas corpus, to discharge from custody any person held by State authorities under criminal proceedings instituted under State enactments, if such enactments are void for repugnancy to the Conntitution, laws or treaties of the United States, but even in such cases we

have held that this power will not be exercised, in the first instance, except in extraordinary cases, and the party will be left to make his defense in the State Court."

* * * * * * * *

"But the existence of the power in the courts of the United States to discharge upon habeas corpus by no means implies that they may, in the exercise of their equity powers, interrupt or enjoin proceedings of a criminal character in a State Court. The plaintiffs state that the toll-gatherers in their service had been indicted by a State Court for violating the provisions of the act of 1895 in respect of tolls. Let them appear to the indictment and defend themselves upon the ground that the State statute is repugnant to the Constitution of the United States. The State Court is competent to determine the questions thus raised, and is under duty to enforce the mandates of the supreme law of the land. And if the question is determined adversely to the defendants in the highest Court of the State in which the decision could be had, the judgment may be re-examined by this Court upon writ of error."

Fitts vs. McGhee, 172 U. S., 516.

The Supreme Court of Missouri has expressly held that Equity has no jurisdiction to enjoin the enforcement, by criminal proceedings, of the act in controversy.

State ex rel vs. Wood, 155 Mo., 425.

"A court of equity is without jurisdiction to enjoin criminal prosecutions under a statute or ordinance alleged to be unconstitutional and void, even though it also alleges that it is the purpose of such prosecutions to injure complainant in his property rights, and that such will be their effect."

Davis & Farnum Mfg. Co. vs. Los Angles, 115 Fed. Rep., 537.

Arbuckle vs. Blackburn, 113 Fed. Rep. 616.

In re Sawyer, 124 U. S., 210.

Minneapolis Brewing Co, vs. McGillivray, 104 Fed. Rep. 258.

Hensley vs. Meyers, 45 Fed. Rep., 283.

A distinction is taken between cases where the *sole* method of enforcing an alleged unconstitutional Statute is by criminal prosecutions and those where the statute authorizes the officer in executing such statuts *to seize, destroy, interfere with or confiscate property.*

Minneapolis Brewing Co. vs. McGillivray, 104 Fed. Rep. 1. c., 272.

In the case at bar there is absolutely nothing that can be done, if complainant refuses to submit its beer to the requirements of the act, except to institute criminal prosecutions, and the only effect an injunction could have would be to prevent the institution of such prosecutions.

b. The number of prosecutions that may be begun will not authorize resort to Equity.

"That the defendant may be frequently indicted constitutes no reason why a Federal court of equity should assume to interfere with the ordinary course of criminal procedure in a State Court."

Fitts vs. McGhee, *supra.*

"That fact that the complainants' product is widely sold in Ohio, and many persons may be subject to prosecution, does not enlarge the jurisdiction of a court of equity to interfere by injunction to control prosecutions for alleged violations of the laws of the State."

Arbuckle vs. Blackburn, 113 Fed. Rep. 1. c. 627.

c. The fact that property may be *incidentally* affected or indirectly injured by *criminal* prosecutions, or as a necessary result of such *prosecutions* alone, cannot authorize a resort to equitable interference with such prosecutions.

"Regulations of saloons, beer halls, theaters, and places of amusement generally, market places, slaughter houses, gas works, powder magazines, laundries, cemeteries, fire limits—indeed, of all establishments, trades, and occupations subject to the police power of the State, unavoidably affect property rights, and are usually rendered effective by making their violations public offenses. Now, if there were such jurisdictions as that

for which complainant contends, every controversy over the validity of an ordinance or statute relating to any of the matters enumerated would furnish an occasion for interference by injunction."

Davis & Farnum Mfg. Co. vs. Los Angles, 115 Fed. Rep. l. c., 543.

It is respectfully submitted that from any standpoint the decree dismissing the bill was correct and should be affirmed.

EDWARD C. CROW,
Attorney-General of Missouri, and
WILLIAM M. WILLIAMS,
Attorneys for Appellees.

AN ACT creating the office of inspector of beer and malt liquors of the state and providing for the inspection of beer and malt liquors manufactured and sold in this state.

SECTION
1. Office of beer inspector created—appointment—term of office—qualifications.
2. Shall appoint deputies—salaries of inspector and deputies.
3. Who required to have malt products inspected.
4. What to be used in the manufacture of beer.
5. Requirements when beer other than that manufactured in this state is offered for sale.
6. Shall provide an office—keep record of beer brewed or sold—fees collected and expenditures.
7. Shall inspect all beer and label packages.
7a. State treasurer to provide certificates and labels, etc.
7b. Penalty for false use of certificates or labels.

SECTION
8. Fees for inspection—fees paid into state treasury—"package" construed.
9. Salaries and expenses, how paid.
10. Penalty for selling beer not inspected.
11. Inspector failing to perform his duty, penalty.
12. Prosecutions shall be by indictment or information—disposition of fines and penalties.
13. Beer exported inspected free of cost.
13a. Transportation companies to furnish inspector with duplicate bill of lading—penalty for refusal.
14. Appropriation.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. There is hereby created the office of beer inspector which shall be filled by appointment by the governor by and with the consent of the senate, within thirty days after the taking effect of this act, an inspector of beer and malt products, who shall serve for a term of four years and until his successor is duly appointed and qualified. He shall be an expert beer brewer and a citizen of the United States and of this state for more than two years next prior to his appointment. He shall give a bond in the sum of twenty-five thousand dollars, to be approved by the governor, for the faithful performance of the duties of his office.

SEC. 2. Said inspector shall, with the approval of the governor, appoint such deputies as may be required to carry

out the provisions of this act, not to exceed four in number, and such clerical help as may be necessary. Said deputies shall each receive for their services the sum of fifteen hundred dollars per annum, and said inspector shall receive the sum of three thousand dollars per annum, all salaries and expenses to be paid out of the sums of money now, or that may hereafter be, appropriated for said purpose.

SEC. 3. Every person, persons or corporation who shall erect or keep a brewery for the manufacture or brewing of beer or other malt products within this state, for the purpose of offering the same for sale, shall cause the same to be inspected by the said state inspector.

SEC. 4. No person, persons or corporation, engaged in the brewing or manufacture of beer or other malt liquors, shall use any substance, material or chemical in the manuacture or brewing of beer or other malt liquors, other than pure hops or pure extract of hops, or of pure barley, malt or wholesome yeast, or rice.

SEC. 5. Every person, persons or corporation who shall receive for sale or offer for sale any beer or other malt liquors other than those manufactured in this state shall, upon receipt of same, and before offering for sale, notify the inspector, who shall be furnished with a sworn affidavit, subscribed by an officer authorized to administer oaths, from the manufacturer thereof, or other reputable person having actual knowledge of the composition of said beer or other malt liquors, that no material other than pure hops or the extract of hops, or pure barley, malt or wholesome yeast, or rice, was used in the manufacture of same; upon the receipt of said affidavit, the inspector shall inspect and label the packages containing said beer or malt liquors, for which services he shall receive like fees as those imposed upon the manufacturers of beer and malt liquors in this state.

SEC. 6. The inspector appointed under this act shall provide himself with an office, and shall record on books kept

for that purpose the names and places of business of all persons engaged in the manufacture, brewing and sale of beer and malt liquors. He shall keep a record of all beer and malt liquors manufactured, brewed or sold and the amount produced by each brewery or manufacturer, or sold by dealer. He shall keep a record of all fees collected and all expenditures incurred, and shall make a full and complete report of the same to the governor upon the first day of each year.

SEC. 7. It shall be the duty of such inspector to cause to be inspected all beer or other malt liquors brewed or manufactured or sold in this state, and if he shall find that such beer or other malt liquor has been made from pure hops or the pure extract of hops, or of pure barley, malt or wholesome yeast, or rice, to place upon the package containing such beer or malt liquor his label, certifying that the same has been inspected and made from wholesome ingredients.

SEC. 7a. It shall be the duty of the state treasurer upon the taking effect of this act to provide suitable and inimitable state certificates and labels for this inspection, gauging and labeling, having on each proper places for countersigning by the state treasurer and inspector, and shall safely keep the same together with the plates used in making them, when not in actual use. The state treasurer shall from time to time, upon demand, deliver the aforesaid labels to the inspector, taking therefor his receipt, and shall charge said inspector with the same; and shall from time to time as said inspector makes returns of moneys collected in the course of his inspection credit said inspector's account with such sums, and shall keep a true and correct book account of his dealings with said inspector.

SEC. 7b. It shall be unlawful for any person to attempt to make or make, to attempt to sell or sell, or attempt to use or use any of the certificates or labels, or both, provided for by this act, or imitations thereof, except such persons as

by law are allowed to make, sell and use the same, and any person so offending shall be deemed guilty of a felony, and upon conviction, be punished by imprisonment in the penitentiary for a term not to exceed five years.

SEC. 8. The inspector shall be entitled to receive for inspecting and gauging one-half cent for each gallon contained in each package, and one cent for labeling each package. All fees received by the inspector shall be paid into the state treasury. The word package, as used in this act, shall be construed to mean any vessel of any kind other than pint and quart bottles, in which any beer or malt liquor may be placed for sale, containing eight gallons or less; when said beer or malt liquors are placed in pint or quart bottles, a package, as used in this act, shall be construed to mean not to exceed forty-eight pint bottles or twenty-four quart bottles of beer or malt liquors, which, when manufactured and so bottled must, before sale, be placed in suitable cases containing said number and size of bottles, for inspection and stamping by said state inspector; and when said beer or malt liquors shall be placed in vessels containing more than eight gallons, the word package shall be construed to mean each eight gallons or fractional part thereof so contained in said vessel. (Amended 1901.)

SEC. 9. The expense of said office, including the salaries of the inspector and his deputies, shall be paid monthly out of the amount appropriated by law from the general revenue fund on warrants drawn by the state auditor on vouchers approved by the inspector, and all fees received by the inspector under the provisions of this act shall, on or before the last day of each month, be paid into the state treasury by said inspector, and shall be placed to the credit of the general revenue fund.

SEC. 10. Any person who shall sell any beer or malt liquor within this state which has not been inspected according to the provisions of this act, or contained in packages

which shall not have upon them the certificate of the state inspector, or any person shall fail to destroy said certificate or label after the contents of said package are disposed of, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail for a period of not less than six months, and in addition thereto shall have his license or other authority giving him the right to manufacture or sell said liquors in this state revoked, and shall not again receive any such license or other authorty for a period of two years thereafter.

SEC. 11. If any inspector shall fail to perform any of the duties imposed upon him by this act, or shall in any manner violate any of the provisions thereof, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment in the county jail for not less than thirty days and by a fine not exceeding one thousand dollars, and if any said inspector shall fail to faithfully perform the duties enjoined upon him by this act he may be removed from office by the governor.

SEC. 12. All prosecutions for fines and penalties under the provisions of this act shall be either by indictment or information in any court of competent jurisdiction, and when collected shall be paid one-fourth to the informer and three-fourths into the fund for the construction of public roads and highways in the county in which said offense may have been committed and prosecution begun.

SEC. 13. All beer or other malt liquors manufactured in this state and exported outside of the state for sale, shall be inspected as other liquors designated in this act, but said inspection shall be free of cost to the manufacturer.

SEC. 13a. Every railroad, express or transportation company, shall, when requested, furnish to the inspector a duplicate bill of lading or receipt showing the name of the consignor and consignee, date, place received, destination and

quantity of beer or malt liquors received by them for shipment to any point within this state. Upon failure to comply with the provisions herein, said railroad, express or transportation company shall forfeit and pay to the state of Missouri the sum of fifty dollars for each and every failure, to be recovered in any court of competent jurisdiction. The inspector herein provided for, is hereby authorized and empowered to sue in his own name at the relation and to the use of the state. The penalties collected shall be paid into the state treasury.

SEC. 14. There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, for the years 1899 and 1900, for the pay of the inspector, six thousand dollars; for the pay of four deputies, twelve thousand dollars; for rent, stationery, fuel, printing, and such other things as may be necessary for the transaction of the business of said inspector, the sum of six thousand dollars.

Approved May 4, 1899.